1673. *November* 21. BROWN *against* GAIRNS.

No 41.
A back-bond of trust granted by an appriser, was found to affect the apprising against singular successors, there being no infeftment in this case.

JOHN BROWN having assigned a bond to Alexander Brown, that he might apprise thereupon with his own sums for John Brown's behoof, Alexander Brown gave a back-bond, bearing 'the apprising as to that sum to be to John Brown's 'behoof, and obliged him to denude in favour of John Brown as to that sum.' Thereafter Gairns having apprised the same lands, there is a contract betwixt him and Alexander Brown, whereby Alexander restricts the apprising to a part of the lands, and renounceth the rest in favour of Gairns, who assigned his apprising to a third party.—In the competition of the rights, it was *alleged* for John Brown, that he ought to come in *pari passu* with Gairn's assignees in the whole lands, in respect of the back-bond, declaring 'the apprising to be his 'behoof.'—It was *auswered* for the assignee, That he having acquired right from Alexander Brown the appriser, by the restriction of the back-bond could not operate against him, being but a personal obligement, which could not affect an apprising which was a real right.—It was *replied*, That an apprising before infeftment, or the legal expire, might be qualified or affected with a personal obligment, as well as by intromission or a discharge, albeit they could not be known to the assignee, who taking right within the legal, behoved to take it with hazard, especially seeing inhibition was used upon the back-bond before the restriction.—It was *duplied*, That the inhibition did only operate by way of reduction, and not by reply.

THE LORDS found, That the back-bond was sufficient to affect the apprising being before infeftment, and before the restriction, and therefore brought in John Brown *pari passu*, notwithstanding of the restriction.

Fol. Dic. v. 2. *p.* 64. *Stair, v.* 2. *p.* 231.

*** Gosford reports this case:

MR JOHN DICKSON having intented an action for mails and duties against the Tenants of the lands of Urie, as having right by assignation to a back-bond granted by Alexander Brown to John Brown, bearing that the said Alexander, being to lead a comprising of the said lands, not only for the sums due to himself by the heritor, but likewise for the sums due to the said John Brown, who was another creditor for which his name was only entrusted, and therefor, by his back-bond, did oblige himself to denude himself, and dispone a part of the lands comprised in favour of the said John;—in this action compearance was made for John Gairns, as being infeft in the said lands upon a prior comprising, who *alleged*, That he ought to be preferred, because the said Alexander being infeft upon a second comprising, had transacted and restricted his right to a particular parcel of the said lands, so that any back-bond, albeit prior to the restriction, yet being but a personal right, and a latent deed, could not hinder the

No 41. first compriser to transact and affect his right by the said restriction, seeing the said Alexander was not thereby denuded of any public right by his comprising, it not being *habilis modus* to take away a right of comprising, whereupon the compriser was infeft. It was *answered*, That a comprising of lands being of a far different nature from an heritable and irredeemable disposition whereupon infeftment followed, and by the law and constant practice, may be extinguished by intromission, or a naked discharge of the whole or any part of the principal sum *pro tanto*; and therefore, by a back-bond, declaring the trust which was granted before any infeftment or comprising led, especially in this case, where the back-bond was of that same date of the assignation, and that the comprising was only a right of reversion of a prior comprising, which was transmissible by assignation, and upon which back-bond the granter was charged with horning and inhibition, served before the granting of the restriction, whereupon the allegence is founded:——THE LORDS having considered the case without respect to the inhibition and horning, which could only be the ground of the reduction, found, That a comprising within the legal was such a right as might be extinguished by private deeds, such as discharges or intromissions, with as much of the mails and duties as would amount to the sum contained in the comprising, and thereupon a back-bond granted by the compriser, bearing a trust, before leading of the comprising or any infeftment, was sufficient to denude or qualify his right against a singular successor, as hath been found by the constant practice, when a private discharge was alleged upon; especially considering, that if it were otherways there would be an absolute necessity that every creditor, albeit for never so small a sum, behoved to lead a several comprising, to the ruin of the common debtor, and would open a door to those whose names were entrusted, to defraud all other creditors, against their own back-bonds and declarations, which hath always been looked upon as a perfect security; and it was so decided *in terminis*, the 12th of July 1670, Kennedy against Cunningham, No 39. p. 10205.

Gosford, MS. No 634. p. 367.

1676. *July* 6. GORDON *against* SKENE and CRAWFORD.

No 42. AN assignee to a decree of apprising, granted a back-bond, obliging him to denude upon payment of a certain sum. This found good against an onerous assignee, the legal being still current, and no infeftment upon the apprising.

Fol. Dic. v. 2. p. 64. Gosford. Stair.

*** This case is No 1. p. 7167. *voce* INTIMATION.